1996

The State of Utah v. Glenn Earl Lloyd, II : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellant,	:	Priority No. 2
v.	:	
GLENN EARL LLOYD, II,	:	Case No. 960214-CA
Defendant/Appellee.	:	

BRIEF OF APPELLANT

APPEAL FROM AN ORDER DISMISSING ONE COUNT OF PATTERN OF UNLAWFUL ACTIVITY, UTAH CODE ANN. §§ 76-10-1603 AND 76-10-1603.5 (1995) AND TEN COUNTS OF MONEY LAUNDERING, UTAH CODE ANN. § 76-10-1903 (1995) IN THE THIRD JUDICIAL CIRCUIT COURT, SALT LAKE COUNTY, UTAH, THE HONORABLE MICHAEL HUTCHINGS, PRESIDING

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ORAL ARGUMENT REQUESTED

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BRIEF OF APPELLANT

JURISDICTION AND NATURE OF PROCEEDINGS

The State appeals from the preliminary hearing court's dismissal of one count of pattern of unlawful activity, Utah Code Ann. §§ 76-10-1603 and 76-10-1603.5 (1995); and ten counts of money laundering, Utah Code Ann. § 76-10-1903 (1995). This Court has jurisdiction under Utah Code Ann. § 77-18a-1(2)(a) (Supp. 1996) and Utah Code Ann. § 78-2a-3(2)(e) (Supp. 1996).

ISSUES ON APPEAL AND STANDARD OF REVIEW

1. Did the preliminary hearing court err in concluding that there was insufficient evidence of an "enterprise"to bind defendant over on a charge of pattern of unlawful conduct?

2. Did the preliminary hearing court err in concluding that there was insufficient evidence of defendant's intent to conceal the proceeds to bind defendant over on ten charges of money laundering?

* * *

In reviewing a dismissal for insufficient evidence, the appellate court must view the evidence in the light most favorable to the losing party and, when so viewed, determine if there is a reasonable basis in the evidence to support a prima facie case. If so, the dismissal must be reversed. Highland Const. Co. v. Union Pacific R. Co., 683 P.2d 1042, 1045 (Utah 1984); Management Committee, etc. v. Graystone Pines, 652 P.2d 896, 898 (Utah 1982). See State v. Pledger, 896 P.2d 1226, 1230 (Utah 1995) (upholding bind over "because we cannot say that `the evidence is wholly lacking and incapable of reasonable inference to prove some issue which supports the [prosecution's] claim[.]"). See also State v. Jaeger, 896 P.2d 42 (Utah App. 1995) ("the ultimate decision of whether to bind a defendant over for trial presents a question of law" which is reviewed "de novo without deference").

These issues are preserved in the record (see R. 363-390, 423-433, 1251-1263, 1276-1284).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

All pertinent constitutional provisions, statutes and rules are contained in addendum B.

STATEMENT OF THE CASE

Defendant was charged in a multiple count information with 14 felony counts of securities fraud in violation of Utah

Code Ann. §§ 61-1-1 and 61-1-21 (1995 and Supp. 1996); 10 felony counts of offering unregistered securities in violation of Utah Code Ann. §§ 61-1-7 and 61-1-21 (1995 and Supp. 1996); 1 second degree felony count of pattern of unlawful activity in violation of Utah Code Ann. §§ 76-10-1603 and 76-10-1603.5 (1995); and 10 second degree felony counts of money laundering, in violation of Utah Code Ann. § 76-10-1903 (1995) (R. 307-332). Following a preliminary hearing held on November 13-16, 1995, defendant was bound over for trial on all (counts 1-24) but the pattern of unlawful activity (count 25) and money laundering charges (counts 26-35) (R. 457-466) (a copy of the trial court's written Findings of Fact and Conclusions of Law and Order is contained in Addendum A). The State appeals the order dismissing these charges.

STATEMENT OF THE FACTS[1]

In the mid to late 1980's and continuing up until the filing of the instant charges, on November 13, 1995, defendant networked social and professional acquaintances to gain introductions to several Utah doctors (see, e.g., R. 307, 836-38, 856-57, 902, 923-24, 1008, 1061, 1195). Defendant represented

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[1] The State's recitation of events underlying the charges is derived from evidence presented at the preliminary hearing and is set forth in the light most favorable to the State, including all reasonable inferences therefrom. See State v. Pledger, 896 P.2d 1226 (Utah 1995) (directing magistrates to view preliminary hearing evidence in light most favorable to prosecution and resolve all inferences in the prosecution's favor).

himself as a financial advisor and offered to assist the doctors with financial advice regarding both their individual and/or office pension plans as well as their personal investment goals (see, e.g., R. 836-38, 857, 898, 902-03, 924, 953, 977, 1009, 1061, 1095). Defendant initially purported to represent the investment firms Coordinated Financial Services and/or Richards Investments (R. 923, 953, 978, 1009, 1062), stating that he was part of an investment organization with offices in New York City, New York, and Salt Lake City, Utah (Id.). In describing his investment group, defendant suggested to at least one doctor that "there were several people" in the group, "on [the] due diligence committee that looked at different projects to see if they were viable to invest in[.]" (R. 978). By the early 1990s, defendant had established his own investment advisor business, Applied Financial Concepts (see, e.g., R. 897, 1025, 1062). He continued, however, to offer securities through Richards Investments (Supp. R. 1621, Exh. #71).

Typically, defendant met with the doctors one on one (see, e.g., R. 816-17, 821, 1063), to discuss their individual pension plans and to suggest various "low risk investment opportunities" in approximately ten different companies (see, e.g., R. 820, 823, 833, 863, 872, 882, 954). Defendant promised the doctors that they would receive interest payments on their investments ranging anywhere from 8% to 15% (see, e.g., R. 905-

06, 982, 1049), and that at the end of a specified period, the doctors' principal investment would be returned in full (see, e.g., R. 824, 846, 861, 906, 999, 1003-04, 1052, 1065, 1081, 1197-98). Defendant assured the doctors that their investments were "secured" by liens on the capital owned by the individual companies (see, e.g., R. 820, 863, 872, 913, 1024, 1065, 1076, 1196).

In addition to these assurances, defendant encouraged hesitant doctors to invest by stressing that his own investment advisor business, Applied Financial Concepts, was also investing in a particular company (see, e.g., R. 891, 897, 1015, 1025, 1052). As a consequence, the doctors believed that defendant was acting solely as an agent seeking investors and that he had no personal interest in the various offered businesses (see, e.g., R. 939, 961, 991). The doctors were further led to believe that defendant would receive his compensation in fees and percentages from the companies he purported to represent (see, e.g., R. 862, 872, 983, 1201).

Based on defendant's representations and assurances, each of the nine doctors agreed to invest in at least one of the companies defendant offered (see, e.g., R. 815-817, 830-31, 858, 868, 874, 877, 904, 928, 978, 989, 1017-18, 1064, 1068, 1075, 1077, 1145, Supp. R. 1433-1523, 1525-1540, Exh. ## 53A-59A, 61A-63A). Each doctor choosing to invest in a particular company

personally handed defendant a check made out to that business in amounts varying from between $10,000 and $150,000 (Id.).

Significantly, defendant never informed any doctor that he had been enjoined by the United States Department of Labor from "acting in any fiduciary capacity and from providing investment advice" for a ten year period beginning May 29, 1990 (see, e.g., R. 826, 848, 908, 939, 985, 1000-02, 1028, 1086, 1204). Nor did he inform any doctor that his Idaho securities license had been revoked (see, e.g., R. 882, 1030, 1086).

Although several doctors received minimal returns on their investment, the returns were in the form of cashiers' checks drawn on a bank, rather than from any particular company in which the doctor had invested (R. 907, 941, 983, 992, 1054-55). These payments did not continue, nor did any doctor recover his full investment at the end of the specified period (Id.).

State's investigator Verdi White looked into allegations of defendant's involvement in securities fraud and money laundering (R. 1119). In so doing, White uncovered nine checking accounts at several Utah banks wherein defendant deposited the doctors' monies. Although defendant owned and controlled these accounts, they were named after the registered and unregistered businesses for which defendant had purported to solicit the doctors' investments including Sourceline Capital, A.F.C., A.F.C. Inter-cap, Internal Capitalization Partnership,

C.C. Management, F.C. Finance, F.C. Leasing, Peak Strategy Management, and Tempus Utile (R. 1109-1186, 1223-1235).[2] White did not determine whether any of these checking accounts were interest bearing accounts and did not view that information as critical to his investigation (R. 1155-56). Rather, White tracked the doctors' monies into and out of the various defendant controlled accounts, including defendant's personal withdrawals and transfers between accounts.[3] White also investigated whether there was any ongoing business and/or company associated with any of the account names and found none (R. 1156, 1162). Although one of the account names was also a limited corporation, White found no indication of an ongoing business related to that account. White concluded that the accounts were merely shell accounts (R. 1183-85).

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[2] Defendant also deposited one doctor's money into an account, Cross Country Management, over which he did not have signatory authority (R. 1157).

[3] To assist the preliminary hearing court in keeping track of the multiple transactions investigated, White had a chart and spreadsheet prepared for each account depicting the amounts of and dates on which the victims' checks were deposited, as well as the amounts of and dates on which defendant made subsequent withdrawals from and/or transfers between the suspect accounts (R. 1121-22; Supp. R. 1433-1540, Exh. ## 53-59A, 61-63A). The charts were not intended to reflect a complete representation of the activity in each individual account, but rather to focus on those transactions involving the doctors' monies (R. 1138). The State's recitation of the evidence supporting the information highlights those transactions emphasized in the preliminary hearing and does not attempt to detail every transaction otherwise set forth in the spreadsheets.

Defendant never informed the doctors that their money would be deposited into these accounts and/or transferred to and commingled with funds in other defendant controlled accounts (see e.g., R. 873, 875, 881, 883-84, 888-89, 909, 919, 940-41, 1029, 1077, 1079-80, 1100-03, 1204-06, 1211).

The transactions in each account pertinent to the charges of pattern of unlawful conduct and money laundering are set forth below.

Sourceline Capital. Defendant maintained sole signatory authority for this First Security Bank Account (FSB) (R. 1124-25). Although defendant registered the Sourceline Capital name for business purposes, listing himself and Jerry Sheets as the owners (R. 1124-25; Supp. R. 1327-1329, Exh. #5), White found no evidence of an ongoing business operating under that name (R. 1124-25, 1133).[4]

Deposits. In May 1993, defendant opened this account by depositing a $10,000 check solicited from Dr. Sheffield (Supp. R. 1367-1368, 1524-1526, Exh. ## 23, 61-61A). Later this same month, defendant, transferred $1,500 from his financial advisor

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[4] Defendant maintained another Sourceline account at Draper Bank from which funds were transferred to the F.C. Finance account discussed at p. 10, infra (see Supp. R. 1448, Exh. # 56). Because no victims' proceeds were directly deposited into this second Sourceline account, no chart and spreadsheet for the account were introduced at the preliminary hearing.

business account, Applied Financial Concepts (Supp. R. 1524-1526, Exh. ## 61-61A).[5]

Withdrawals/Transfers. Following these deposits and prior to March 1994, defendant personally withdrew $8,873 from the account and caused a $1,300 check to be issued to his wife, Julie Lloyd (R. 1126-27; Supp. R. 1524-1526, Exh. ##61-61A). Defendant also transferred $1,525 to the Applied Financial Concepts account (Id.)

F.C. Finance. This FSB account was solely owned and controlled by defendant (R. 1137). Defendant registered the F.C. Finance name for business purposes, but White found no other evidence of an ongoing business (R. 1138, 1143).

Deposits. Defendant opened the account in March 1990 when he deposited the first of many checks solicited from Dr. Nelson; the chart and spreadsheet prepared for the F.C. Finance account reflect that from approximately March 1990 to July 1992, defendant deposited $40,394 of Dr. Nelson's money into the account (Supp. R. 1448-1473, Exh. ## 56-56A). Additionally, during March 1990 to March 1994, defendant transferred funds from his other accounts including F.C. Leasing ($24,777), Peak

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[5] Although the charts and spreadsheets admitted below reflect a number of transfers to and from the Applied Financial Concepts account to defendant's other accounts, no victims' check were directly deposited into the Applied Financial Concepts account, thus, the specific chart and spreadsheet for this account were not introduced into evidence.

Strategy ($45,563), Sourceline Capital (FSB) ($1,838), C.C. Management ($25,000) (Id.), and a second F.C. Finance account which defendant maintained at West One Bank (WOB)($3,750)(Id.).[6]

Withdrawals/Transfers. Following the deposit of Dr. Nelson's first check on March 13, 1990, and up until March 1994, defendant personally withdrew approximately $29,245 from the F.C. Finance account (Id.). Further, defendant transferred proceeds from this account to his other controlled accounts including Tempus Utile ($2,000), and F.C. Leasing ($4,331), Internal Capitalization Partnership ($1,000), and the WOB F.C. Finance account ($9,165). Checks were also drawn on the account and issued to defendant's business account, Applied Financial Concepts ($1,000), and to his wife ($ 7,050) (Id.).

F.C. Leasing. Defendant maintained sole signatory authority over this FSB account (R. 1144). While defendant registered the F.C. Leasing name for business purposes, White found no indication that F.C. Leasing was an ongoing company (R. 1144).

Deposits. The chart and spreadsheet for this account reveal that from approximately December 1991 to May 1993,

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[6] Defendant transferred an additional $19,000 from a second Sourceline account maintained at the Draper Bank (Supp. R. 1448, Exh. # 56). See supra note 4. The chart and spreadsheet for this second Sourceline account, as well as the second F.C. Leasing account maintained at WOB were not introduced below.

defendant deposited proceeds from doctors Ellingson ($20,000), Rappleye ($29,250), Gruwell ($40,975), Bennett ($20,000), Nelson ($79,230), Gadd ($15,000), Robinson ($10,000) and Saunders ($25,000) (Supp. R. 1474-1509, Exh. ## 57-57A). Additionally, from approximately January 1990 to May 1993, defendant transferred funds into this account from his financial advisor business account, Applied Financial Concepts, ($28.28), and his other accounts' including International Capitalization ($1,000), F.C. Finance ($7,356), and Tempus Utile ($6,216) (Id.).

Withdrawals/Transfers. From approximately January 1990 to June 1994, defendant personally withdrew approximately $57,337 from the account, and caused additional checks to be issued to his wife ($6,100), and to his investment business account, Applied Financial Concepts ($13,000) (Id.). Defendant also transferred funds to his other solely controlled accounts including Tempus Utile ($2,500), F.C. Finance ($33,102), and Sourceline Capital ($33,325) (Id.).

Tempus Utile. Defendant was the sole signatory on this First Interstate Bank account (R. 1165). The Tempus Utile name was also registered as a limited liability company listing defendant, Wayne King, Colleen King and Pat Murphy as its managers (Id.).

Deposits. Defendant deposited a $15,000 check solicited from Dr. Bennett on February 6, 1992. Prior to the

Nelson deposit, the account had a balance of $129.26 (Supp. R. 1527, 1532, Exh. ## 62-62A). The chart and spreadsheet for this account further indicate that up until approximately September 1992, defendant deposited additional checks solicited from doctors Nelson ($10,000), Saunders ($25,000), Gruwell ($10,000), Gadd ($10,000) and Rappleye ($10,000) (Id.). Defendant also transferred funds to this account from other accounts including F.C. Finance ($2,000), F.C. Leasing ($2,500) and his investment business account ($10,000) (Id.).

Withdrawals/Transfers. Defendant made personal withdrawals from the account ($8,048) and also transferred money to his other accounts' including F.C. Finance ($2,000), F.C. Leasing ($2,500), and Sourceline Capital ($10,000) (Id.).

A.F.C. Defendant had sole signatory authority this FSB account (R. 1147). A.F.C. was not a registered business name (Supp. R. 1335-1339, Exh. #8), nor did White find any other evidence of an ongoing company under this acronym (R. 1149). The account was separate from defendant's business account, Applied Financial Concepts, which name was registered for business purposes (R. 1149).

Deposits. Defendant opened this account with a $100 deposit on December 3, 1990. Thereafter, between December 3, 1990 and December 6, 1990, defendant deposited checks solicited from Dr. Rappleye ($10,000) (Supp. R. 1541-1598, Exh. # 68

(Rappleye Deposition, see Supp. R. 1599, Exh. # 1, attached thereto)), Dr. Gruwell ($10,000) (Supp. R. 1373-1374, Exh. #26), and Dr. Nelson ($10,000) (Supp. R. 1393-1394, Exh. #36) (see R. 1148; Supp. R. 1432-1433, Exh. ## 53-53A). He also deposited a $10,000, from an unknown source (Supp. R. 1433, Exh. # 53A).

Withdrawals/Transfers. By December 7, 1990, defendant had personally withdrawn all but the initial $100 deposit from this account (Id.).

Peak Strategy Management. Defendant maintained sole signatory authority for this FSB account (R. 1153). Peak Strategy Management was not a registered business name, nor did White find any other evidence of an ongoing business (R. 1153).

Deposits. Defendant opened the account in October 1993 by depositing a $25,000 check solicited from Dr. Nelson (Supp. R. 1521, Exh. ## 59A). Thereafter, from approximately October 1993 to March 1994, defendant deposited additional monies solicited from Dr. Nelson ($45,000), as well as Dr. Bennett ($20,625) (Supp. R. 1409-1412, 1520-1523, Exh. ## 42, 59-59A).

Withdrawals/Transfers. During this same period defendant made personal withdrawals ($5,000) and transferred funds to his other accounts including F.C. Finance ($45,563), and Applied Financial Concepts ($5,125) (Id.).

Cross Country Management. This Bank One account was the only account not solely owned and controlled by defendant;

rather, the account signatories were listed as Ed Parker and Myron Abbott (R. 1157). However, defendant opened the account on July 20, 1993, depositing a $25,000 check from Dr. Nelson (Supp. R. 1533-1540, Exh. ## 63-63A). Seven days later, on July 27, 1993, Abbott issued a check for $25,000 to F.C. Finance, an account over which defendant did maintain sole control (Id.). There were no other deposits to the account between July 20, 1990 and July 27, 1990 (Id.).

Similarly, defendant deposited a $10,000 check from Dr. Bennett on August 12, 1993 (Supp. R. 1533-1540, Exh. ## 63-63A). Prior to this deposit, the account balance was $51.63 (Id.). One day later, on August 13, 1993, an entity known as G&H Market deposited $1,350 into the Cross Country Management account (Id.). Three days later after G&H Market deposit, on August 16, 1993, $10,000 was transferred from the Cross Country Management account to the defendant-controlled FC Finance account, leaving a balance of $1,401.63 in the Cross Country Management account (Id.).

A.F.C. Inter-cap. Defendant maintained sole signatory authority for this Zions National Bank (ZNB) account (R. 1159). The A.F.C. Inter-cap name was not registered for business purposes, nor did White find any other indication of an ongoing company (R. 1161).

Deposits. The chart and spreadsheet for this account indicate that defendant opened it on December 26, 1991 with a

$20,000 check received from Dr. Bennett (Supp. R. 1434-1440, Exh. ##. 54-54A). On July 1, 1992, defendant deposited a $15,000 check received from Dr. Saunders (Id.). From the opening date of the account up until January 1993, defendant also transferred additional funds to the account from the Internal Capitalization Partnership ($6,799) and Sourceline Capital ($925) accounts (Id.).

Withdrawals/Transfers. Additionally, over this same period, defendant personally withdrew $1,500 from the account, and transferred funds to his other accounts including F.C. Leasing ($2,062) and Sourceline Capital ($21,137) (Id.).

C.C. Management. Defendant maintained sole signatory authority for this FSB account (R. 1168). C.C. Management was not registered as a business name and White found no indication that it is an otherwise ongoing company (Id.).

Deposits. Defendant opened the account on October 25, 1993, depositing a $25,000 check solicited from Dr. Nelson (R. 1168-69; Supp. R. 1441-1447, Exh. ## 55-55A). Over the next eight month period until May 1994, defendant deposited an additional $65,000 of Dr. Nelson's money into the account (Id.).

Withdrawals/Transfers. During this same period, defendant withdrew funds from the C.C. Management account on his own behalf ($31,000), and on behalf of his wife ($2,000) (Exh. ## 55-55A). He also transferred funds to his business account,

Applied Financial Concepts ($8,000), and to his other controlled accounts including F.C. Finance ($45,000) and Peak Strategy ($20,000) (Id.).

Internal Capitalization Partnership. Defendant was the sole signatory for this FSB account (R. 1170). The name was not registered for business purposes, nor did White find any other indication of an ongoing company known as Internal Capitalization Partnership (Id.).

Deposits. The chart and spreadsheet for this account indicate that a $15,000 check solicited from Dr. Gruwell was the opening deposit for this account (Supp. R. 1510-1519, Exh. ## 58-58A). From approximately December 1989 to November 1991, defendant deposited an additional $15,000 of Dr. Gruwell's money, as well as checks solicited from doctors Nelson ($75,000), Bennett ($15,000), Gadd ($15,000), and Rappleye ($30,000) (Id.). He also transferred funds to the account from his F.C. Finance account ($1,000) (Id.).

Withdrawals/Transfers. From approximately January 1990 to December 1991, defendant transferred funds from this account to his investment business account ($4,800), and to his other accounts including A.F.C. Inter-cap ($6,799), and F.C. Leasing ($1,000) (Id.).

Ruling. At the conclusion of the preliminary hearing, the magistrate made the following uncontroverted factual findings:

a. During all times relevant to the charges presented (1991 through 1994), defendant maintained an investment advisor business entitled Applied Financial Concepts through which he gave investment advice, assisted individuals in investing their money and transferred individuals' money to various investments.

b. The defendant represented himself as an investment advisor to [doctors Bennett, Sheffield, Ellingson, Gruwell, Saunders, Nelson, Robinson, Gadd and Rappleye].

c. In his capacity as an investment advisor, defendant personally met with each of the above-referenced individuals to discuss investing in one or more of the following companies: FC Leasing, CC Management, Cross Country Management, Peak Strategy Management, Sourceline Capital, AFC Inter-Cap, Internal Capitalization Partnership, Tempus Utile, FC Finance, and AFC.

d. In each meeting, defendant described [these] companies as existing, viable companies doing business in the State of Utah.

e. The defendant told each physician that his investments were low risk and that his principal would be returned in a period of one to three years and during that time period, the physicians would receive monthly or quarterly interest payments, ranging from eight to fourteen percent.

f. After the physicians were offered the securities, the physicians agreed to invest in the described business and, in each instance physically handed the defendant a check issued to the specific business in which they had decided to invest.

g. The defendant opened the following checking accounts through the use of registered and

unregistered dbas: Sourceline Capital (Draper Bank) ("Draper") #91-02679-9, FC Finance (First Security Bank ("FSB") #216-26776-10)), FC Leasing (FSB #216-25076-16), AFC (FSB #216-26091-15), Peak Strategy Management (FSB #216-1019290), (Cross Country Management (Bank One #1162-8004), AFC Inter-Cap (Zions Bank #015-352206), Tempus Utile (First Interstate Bank #26-03050-2), CC Management (FSB #216-10192-82), and Internal Capitalization Management (FSB #216-00229-15). The defendant was the sole signatory on these accounts and defendant was the only person who deposited or withdrew money out of these accounts.

h. There were two Sourceline Capital accounts, one at Draper Bank and one at First Security Bank. The Sourceline Capital account at Draper Bank listed Jerry Sheets as a signatory and is not relevant to the State's money laundering charge. However, the First Security Bank Sourceline Capital account (FSB #216-00015-88) was established by the defendant and he was the sole signatory.

i. After the defendant personally received the victims' checks, he deposited the checks into [these]accounts which he owned and controlled. These accounts bore the name of the security offered the victim so the money could be deposited into that account.[7]

j. Cross Country Management at Bank One listed Myron Lee Abbott and Edward C. Parker as signatories. However, Dr. Nelson's $25,000 was the opening deposit in that account on July 20, 1993. On that same day, $10,000 cash was also placed in the account. On July 27, 1993, Myron Abbott issued a check for $15,000 from the Cross Country account to FC Finance, an account over which the defendant

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[7] The trial court also made findings as to which victims money went to which defendant controlled account, which are not duplicated here(see R. 461-62, a complete copy of the magistrate's ruling is contained in addendum A).

had sole control. Other than these three transactions, no other money went in or out of the Cross Country Management account during the week of July 20-27, 1993. Within one week, the defendant gained control over Dr. Nelson's $25,000, which Dr. Nelson was told would be invested in a business entitled Cross Country Management.

k. At all times relevant hereto, the defendant told the victims that their proceeds were invested in the existing, viable Utah companies which he initially offered them and that the proceeds were not in his control. Defendant refused to answer the physicians' questions regarding the proceeds' location, nature and control.

l. Each time a victim actually received an alleged interest payment on his investment, he would receive it in the form of a cashier's check drawn on a bank and not from the alleged investment entity or even the defendant-controlled account by the same name.

m. After the physicians' funds were deposited into one or more of the defendant-controlled accounts, the spreadsheets (Exh. ##53A-59A, 61A-63A) established that the following relevant activity occurred: 1) Funds would be withdrawn and deposited in the various defendant-controlled accounts; 2) Funds would be withdrawn from the defendant-controlled accounts and deposited into one or more of the defendant's personal accounts; 3) Funds would be withdrawn from the defendant-controlled accounts and transferred to other entities not controlled by the defendant; or 4) Funds would be deposited into the defendant-controlled accounts from other entities not controlled by the defendant.

n. The spreadsheets from each defendant-controlled account (Exh. ## 53A-59A, 61A-63A) established and explained the deposit and withdrawal activity which occurred specifically between the ten defendant-

controlled accounts as well as the defendant's personal checking accounts.

o. However, the State presented no testimony explaining the withdrawal and deposit activity in the defendant-controlled accounts relating to entities not controlled or established by the defendant such as Star King, Adalyn Financial, Capstone and Towers, among others.

p. Furthermore, the State's witness which testified as to the above-described accounts could not tell the Court whether these defendant-controlled accounts were interest bearing.

q. During the time defendant was transferring these funds between his accounts and to himself, he continued to maintain his investment advisor company, Applied Financial Concepts, and continued to represent himself as an investment advisor.

(R. 459-464, see addendum A).

Based on these findings, the magistrate concluded that there was probable cause to bind defendant over on twenty four counts of securities act violations and that the securities act violations also established the pattern element of the pattern of unlawful activity charge (R. 464, see addendum A). Although the magistrate found sufficient evidence to establish the pattern element, the magistrate concluded that there was no probable cause to suggest "that defendant's use of his investment advisor business, Applied Financial Concepts and his use of various licit and illicit dbas in establishing the checking accounts wherein he deposited the physicians' checks demonstrated the existence of an

enterprise" (R. 465, see addendum A). Rather, the magistrate concluded "that the evidence used to establish the existence of the investment advisor company as well as the various dbas [was] evidence which only further established and prove[d] the elements of the pattern (the securities fraud and the sale of unregistered securities), and not the existence of an enterprise" (Id.). Finally, referring to the ten money laundering counts, the magistrate concluded "that there [was] no probable cause to establish that the defendant intentionally concealed the proceeds since no evidence was presented to answer [its] questions as to the various transactions which transpired between the defendant-controlled accounts and other entities after the deposits of the physicians' proceeds into the defendant-controlled accounts" (Id.).

SUMMARY OF THE ARGUMENT

Point I. This is an appeal from the magistrate's refusal to bind over one charge of pattern of unlawful activity and ten charges of money laundering. Concerning the pattern of unlawful activity charge, the magistrate correctly concluded that defendant's 24 securities act violations (for which he was bound over) constituted the pattern element of this offense. However, the magistrate erred as a matter of law when it failed to conclude that defendant's investment advisor business, Applied Financial Concepts, and/or defendant's relationship with various

registered and unregistered businesses was sufficient to establish the enterprise element of the offense. The magistrate's error was driven by its failure to properly apply the liberal bind over standard and to fully consider the broad remedial purposes of Utah's Pattern of Unlawful Activity Act.

POINT II. Additionally, the magistrate misapplied the bind over standard and erred as a matter of law when it required proof concerning the ultimate use of the laundered proceeds in this case. Utah's money laundering statute contains no such requirement. Rather, the money laundering statute focuses on transactions designed to conceal the proceeds of illegal activity. See Utah Code Ann. § 76-10-1903 (1994). Contrary to the magistrate's reasoning, disguised and/or concealed bank deposits like that perpetrated here constitute sufficient proof of concealment for money laundering purposes. Moreover, the State introduced evidence that defendant transferred the proceeds between his controlled accounts and personally withdrew proceeds as well. Such is adequate to establish defendant's ultimate control over and use of the proceeds for purposes of bind over.

ARGUMENT

POINT I

THE MAGISTRATE ERRED IN FAILING TO RECOGNIZE THAT DEFENDANT'S INVESTMENT ADVISOR BUSINESS AND/OR HIS ASSOCIATION-IN-FACT WITH THE REGISTERED AND UNREGISTERED BUSINESSES HE PURPORTED TO REPRESENT CONSTITUTED SUFFICIENT

INDICIA OF AN ENTERPRISE FOR BIND OVER ON A CHARGE OF PATTERN OF UNLAWFUL ACTIVITY

Defendant is charged with violating Utah's Pattern of Unlawful Activity Act (UPUA), Utah Code Ann. § 76-10-1603 (1995) (R. 322-23).[8] To convict, the prosecution must establish two elements, a pattern of racketeering and the existence of an enterprise. See State v. McGrath, 749 P.2d 631, 636 (Utah 1988) (requiring proof one element beyond the pattern of racketeering activity--the existence of an enterprise). Significantly, the State need not necessarily adduce different proof to establish these separate elements. See United States v. Sanders, 928 F.2d 940, 943 (10th Cir.) (citing United States v. Turkette, 452 U.S. 576, 583 (1981) (holding that "proof used to establish these separate elements may in particular cases coalesce")), cert. denied, 502 U.S. 845 (1991).

Here, the magistrate correctly concluded that there was probable cause to establish the pattern element of the UPUA charge, based on its determination that defendant had committed 24 separate securities act violations (which violations

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[8] Defendant is charged under all three UPUA subsections (R. 322-23). UPUA subsections (1) and (2) prohibit the receipt and use of proceeds derived from a pattern of unlawful activity in the acquisition, establishment, or operation of any enterprise, section 76-10-1603(1), and/or the maintenance of any interest in or control of any enterprise, section 76-10-1603(2). The third subsection, section 76-10-1603(3), prohibits a defendant associated with or employed by an enterprise from conducting that enterprises affairs through a pattern of unlawful activity.

constitute the 24 counts previously bound over for trial in this matter). The issue in this appeal is the magistrate's erroneous further conclusion that the State failed to establish probable cause for the second UPUA element, the existence of an enterprise (see R. 464, see addendum A). Based on this erroneous conclusion, the magistrate dismissed the UPUA charge. The dismissal is inconsistent with the broad remedial purposes underlying the UPUA statute, as well as the liberal bind over standard.

A. UPUA Should be Broadly Interpreted in Order to Effectuate its Remedial Purpose

UPUA was originally enacted in 1981, and was modeled after the federal Racketeering Influences and Corrupt Organization Act (RICO), 18 U.S.C. §§ 1962-1968.[9] This Court has previously recognized that while RICO and consequently, UPUA "were intended to apply to persons engaged in acts traditionally associated with organized crime, a nexus to organized crime was not included as an element of the offense." State v. Thompson, 751 P.2d 805, 815 (Utah App. 1988) (citing Sedima, S.P.R.L. v. Imrez Co., Inc., 473 U.S. 479, (1985)), rev'd on other grounds, 810 P.2d 415 (Utah 1991). Accordingly, UPUA is not limited in

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[9] In 1987, the Legislature changed the title of § 76-10-1603 from "Utah Racketeering Influence and Criminal Enterprise Act" (RICE) to "Utah Pattern of Unlawful Activity" (UPUA). Because the Act itself remained substantially unchanged, all references to RICE in case authority have been changed to UPUA.

application to persons affiliated with organized crime. Id. See also Bradford v. Moench, 670 F.Supp. 920, 928 (D.Utah 1987) (noting the similarity between UPUA and RICO). Indeed, the underlying purpose of racketeering statutes like RICO and UPUA is to provide new and enhanced penalties and legal remedies for all types of organized criminal behavior including sophisticated white-collar schemes like that perpetrated here. United States v. Cauble, 706 F.2d 1322, 1330 (5th Cir. 1983), cert. denied, 465 U.S. 1005 (1984). Therefore, UPUA like its federal counterpart, should be broadly interpreted in order to effectuate these remedial purposes. See United States v. Turkette, 452 U.S. 576, 587 (1981) (Congress directed that RICO statute "be liberally construed to effectuate its remedial purposes"). The magistrate's dismissal of the UPUA charge in this case, fails to recognize these broad remedial goals.

B. Bind Over Should Occur Unless the Evidence Is Wholly Lacking and Incapable of Reasonable Inference to Prove the Charged Offenses

The dismissal order is also inconsistent with the liberal bind over standard. Indeed, the probable cause standard for criminal bind over is not the equivalent of the reasonable doubt standard applicable in a criminal trial, nor even the preponderance standard applicable in civil cases. State v. Pledger, 896 P.2d 1226, 1229 (Utah 1995). Rather, it requires only "a quantum of evidence sufficient to warrant submission of

the case to the trier of fact." Id. (quoting State v. Anderson, 612 P.2d 778, 783 (Utah 1980)). Accordingly, the Supreme Court directs magistrates to view preliminary hearing evidence in the light most favorable to the prosecution and to resolve all inferences in the prosecution's favor. Pledger, 896 P.2d at 1229. This means that even "close calls" should result in a determination to bind over for trial. Id. at 1230. Indeed, it is presumed that prosecution evidence will only strengthen by time of trial. Id. at 1229 (quoting Diaz v. State, 728 P.2d 503, 510 (Okl.Cr. 1986)). Therefore, magistrates are directed to bind criminal defendants over for trial "[u]nless the evidence is wholly lacking and incapable of reasonable inference to prove some issue which supports the [prosecution's] claim[.]" Id. (quoting Cruz v. Montoya, 660 P.2d 723, 729 (Utah 1983) (setting out standard for directed verdict in civil case)).

Although the magistrate invoked the probable cause standard in this case, he failed to properly apply it. While the magistrate made specific factual findings regarding the existence of defendant's investment advisor business, and/or his association with the registered and unregistered businesses he purported to represent (R. 459-464, see addendum A), the magistrate failed to draw the further reasonable inferences that this evidence constituted sufficient indicia of a UPUA enterprise (Id.). This failure constitutes error as a matter of law. Id.

Accord People v. Lewis, 791 P.2d 1152, 1154 (Colo Ct. App. 1989), cert. denied, (April 9, 1990) (failure to draw all permissible inferences and view the evidence in the light most favorable to the prosecution constitutes error as a matter of law).

C. *Defendant's Sole Proprietorship Constitutes Sufficient Indicia of a UPUA Enterprise*

Consistent with the remedial aims of UPUA, an enterprise is broadly defined as "any individual, sole proprietorship, partnership, corporation, business trust, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity, and includes illicit as well as licit entites." Utah Code Ann. § 76-10-1602(1) (1995). Accordingly, the State presented evidence regarding the probable existence of two alternative enterprises: 1) Defendant's investment advisor business, Applied Financial Concepts, which is discussed under this heading, and/or 2) an association-in-fact enterprise consisting of defendant, and the various registered and unregistered businesses he purported to represent, which is discussed infra, under heading D (R. 381-82, 424-38). Significantly, the magistrate found that the investment advisor business existed and facilitated defendant's securities fraud scam (R. 459-464, see addendum A). The magistrate also found that defendant used various registered and unregistered businesses to establish the bank accounts wherein he deposited

the proceeds of his securities scam (Id.). However, the magistrate ultimately rejected both of the State's enterprise theories, concluding that there was "no probable cause to suggest that defendant's use of his investment advisor business, Applied Financial Concepts, and his use of the various licit and illicit "dbas" in establishing the checking accounts wherein he deposited the physicians' checks demonstrated the existence of an enterprise" (R. 464-65, see addendum A). Rather, the magistrate concluded that defendant's investment advisor business and/or association with the various registered and unregistered businesses simply constituted further evidence in support of the pattern element (Id.).

Turning to the State's first theory, that defendant's investment advisor business constituted the UPUA enterprise, the magistrate's conclusion suggests that defendant cannot be both the UPUA defendant and the UPUA enterprise. This conclusion is inconsistent with the broad UPUA definition of enterprise which expressly includes "*any* individual or sole proprietorship." Section 76-10-1602(1) (emphasis added). Indeed, the non-exclusive term "any" reasonably contemplates that both defendant and non-defendant individuals and/or sole proprietorships may be named as the UPUA enterprise. See State v. Bowen, 413 So.2d 798, 799 (Fla. App. 1982) (interpreting similar enterprise definition and deeming it significant that the legislature could have easily

"narrowed" the definition "by supplanting 'any' with 'another'"), review denied, 424 So.2d 760 (Fla. 1983).

Further, at least one federal district court suggests that an individual defendant may be *both* the RICO defendant and the RICO enterprise under 18 U.S.C. §§ 1962(a), which corresponds with UPUA subsection 76-10-1603 (1). See United States v. Di Caro, 772 F.2d 1314 (7th Cir. 1985) (suggesting in dicta that an individual defendant who used income derived from a pattern of racketeering activity in the operation of an enterprise (himself) can be both the liable 'person' and the 'enterprise' for purposes of criminal prosecution under subsection (a) of federal RICO statute), cert. denied, 475 U.S. 1081 (1986). See also United States v. Yonan, 622 F.Supp. 721, 728 (D.C. Ill. 1985) ("Congress could rationally have decided an individual who engages in a 'pattern of racketeering activity' and puts his or her ill-gotten gains to work in his or her interstate-commerce-affecting business (a sole proprietorship) should be criminally responsible" under RICO subsection (a)). The DiCaro and Yonan courts' suggestions that an individual defendant with a sole proprietorship may be charged as both the defendant and the enterprise for purposes of RICO subsection (a), is consistent with the majority view that a defendant *corporation* may be both the RICO defendant and the RICO enterprise. See, e.g., Schofield v. First Commodity Corp., 793 F.2d 28, 29-30 (1st Cir. 1986);

B.F. Hirsch v. Enright Refining Co. Inc., 751 F.2d 628, 633 (3rd Cir. 1984); Busby v. Crown Supply, Inc., 896 F.2d 833, 841 (4th Cir. 1990), (overruling United States v. Computer Sciences Corp., 689 F.2d 1181 (4th Cir. 1982), cert. denied, 459 U.S. 1105 (1983)); In re Burzynski, 989 F.2d 733, 743 (5th Cir. 1993); Haroco, Inc. v. American National Bank and Trust Co., 747 F.2d 384, 401-02 (7th Cir. 1984), aff'd, 473 U.S. 606 (1985); Schreiber Distributing Co. v. Sery-Well Furniture Co., 806 F.2d 1393, 1398 (9th Cir. 1986).

The validity of defendant's dual role under UPUA subsection (3) is perhaps a closer question. As a consequence of the "employed by or associated with" language in the corresponding RICO subsection (c), the majority of federal courts have concluded that the individual and/or corporation cannot be both the defendant and the enterprise when charged thereunder. See, e.g. Schofield, 793 F.2d at 29 (citing cases); Haroco, 47 F.2d at 400 (noting language in section 1962(c), unlike 1962(a) and 1962(b), requires "that the liable person be 'employed by or associated with any enterprise,'" which language "appears to contemplate a person distinct from the enterprise under section 1962(c)").[10]

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[10] At least one jurisdiction has held otherwise. See United States v. Hartley, 678 F.2d 961, 986-88 (11th Cir. 1982), reh'g denied, 698 F.2d 852 (11th Cir. 1982), cert. denied, 459 U.S. 1170 (1983) and 459 U.S. 1183 (1983). In Hartley, the

Significantly, in an opinion decided after Haroco, the Seventh Circuit found a sole proprietorship to be a separate entity for purposes of a RICO subsection (c) prosecution. McCullough v. Suter, 757 F.2d 142 (7th Cir. 1985). Recognizing the general rule set forth in Haroco, the Suter court noted that a sole proprietorship that had no employees or other associates may not qualify as a separate entity for purposes of RICO subsection (c). The court further noted, however, that Suter had several people working for him and this fact made his company a separate enterprise. Id. at 144. Additionally, the court noted that even "if Suter were all by himself and yet adopted the corporate form for his activity," he might well be properly prosecuted under subsection (c). Id. "If the one-man band incorporates, it gets some legal protections from the corporate form, such as limited liability; and it is just this sort of legal shield for illegal activity that RICO tries to pierce." Id. The court concluded that with regards to a sole proprietorship enterprise under subsection (c), the "only important thing is that it be either formally (as when there is

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Eleventh Circuit noted that the "legal existence" of a corporation satisfies the enterprise element of a RICO charge. Id. Therefore, because a corporation is separate and distinct from the pattern element, the Eleventh Circuit held that absent any express prohibition against the dual role, "[a] corporation may be simultaneously both a defendant and the enterprise under RICO," subsection (c). Id.

incorporation) or practically (as when there are other people besides the proprietor working in the organization) separable from the individual." Id. Accord United States v. Benny, 786 F.2d 1410, 1416 (9th Cir.) (applying Seventh Circuit analysis to sole proprietor/RICO defendant who either employed or associated with four other defendants), cert. denied, 479 U.S. 1017 (1986).

At least one state appellate court has analyzed similar legislation and determined that its state legislature intended "to direct the thrust of the RICO act against an individual associating with himself." Bowen, 413 So.2d at 799. As noted previously, Florida, like Utah, includes within its definition of enterprise, "'any' individual or sole proprietorship." Id. If the Florida legislature had not intended to reach individuals like the sole proprietor/defendant in Bowen, the Florida court reasoned it could have easily "narrowed" the definition of enterprise "by supplanting 'any' with 'another.'" Id. Consequently, the Bowen court determined that it was not necessary for Bowen, the sole proprietor of a mini-storage warehouse, to have associated with a second person or legal entity in order to be charged under Florida's equivalent to UPUA subsection (3). Id. While Bowen apparently had no employees, unlike the sole proprietors at issue in McCullough and Benny, the Florida courts interpreting Bowen have determined that the warehouse constituted a sufficient "de facto entity" with which

Bowen was deemed to have associated himself. See State v. Nishi, 521 So.2d 252, 254 (Fla. App.), review denied, 531 S.2d 1355 (Fla. 1988); State v. Wilson, 596 So.2d 775,781 (Fla. App. 1992).

Here, as in Bowen and McCullough, defendant's investment advisor business was not formally incorporated; however, the State presented sufficient evidence to suggest that it was a separate "de facto" entity for purposes of UPUA subsection (3). Significantly, the magistrate found that defendant clearly represented he was soliciting investments through his investment advisor business (R. 459, see addendum A). This finding is well supported in the record (R. see, e.g., R. 897, 1025, 1062, 1195).[11] Additionally, evidence adduced below but not expressly referenced in the magistrate's findings establishes that defendant assured at least two doctors that his "company," had performed the "due diligence" on the offered stock (see, e.g., R. 872, 978). The evidence further establishes that defendant encouraged hesitant doctors to invest by telling them that his company was also making a particular investment (see e.g., R. 897, 1015, 1025, 1052). For example, defendant told Dr. Robinson that because defendant's company, Applied Financial Concepts, had helped Sourceline Capital to establish in Utah,

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[11] While no physical evidence was introduced, the State's investigator testified that the Applied Financial Concepts name had been registered for business purposes (R. 1149).

defendant's company and its clients had been given an opportunity to participate as equity partners in Sourceline Capitals' business ventures and could expect as much as a 35% return on any investment (R. 1014-16).

In addition to these verbal representations, the evidence established that defendant corresponded with doctors Nelson and Robinson on *tangible* Applied Financial Concepts letterhead (Supp. R. 1416-1417, 1621, Exh. ## 43-44, 71). One of these letters indicated defendant's continued association with Richards Investments and was also typed by someone other than defendant, suggesting that defendant continued to belong to an investment group and that defendant had at least one employee (see Exh. # 71).

Based on the above, the magistrate's finding that the investment advisor business existed, together with the reasonable inferences drawn therefrom, provide probable cause for the existence of a UPUA enterprise. See Pledger, 896 P.2d at 1230 (directing magistrate's to resolve all inferences in the prosecution's favor). Indeed, defendant operated and/or maintained his investment advisor business for purposes of UPUA subsections (1) and (2) when he deposited his ill-gotten proceeds into the defendant-controlled accounts and caused these funds to be transferred between accounts, including his investment advisor business account (see R. 463, see addendum A). See Blue Cross

of Western Pennsylvania, 680 F. Supp. 195, 199 (W.D. Pa. 1988) (finding that same liability analysis applies to both RICO subsections (a) and (b) on the ground that use of income from racketeering activity to operate enterprise can also constitute maintaining one's interest in an enterprise). Further, applying McCullough, Bowen and their progeny, the above evidence also constitutes sufficient indicia of a defacto entity separate from defendant and with which he could associate for purposes of subsection (3). Pledger, 896 P.2d at 1230.

Finally, defendant represented the existence of a legitimate investment advisor business, suggesting that his business was involved with an investment group, and likely employed a secretary. The broad remedial purposes of the UPUA statute persuade that defendant should not escape enterprise liability solely because he was sophisticated enough to avoid formal incorporation. See Turkette, 452 U.S. at 591 ("RICO is equally applicable to a criminal enterprise that has no legitimate dimension *or has yet to acquire one.*"); Schofield v. First Commodity Corp. of Boston, 793 F.2d 28, 32 (1st Cir. 1986) (reading Turkette "to say that where the language in RICO permits liability against a culpable entity, courts should find that such liability exists").

D. Defendant's Association-in-Fact With the Registered and Unregistered Businesses He Purported to Represent Constitutes a UPUA Enterprise

Even assuming this Court deems defendant's investment advisor business insufficient indicia of an enterprise for bind over under any UPUA subsection, the State presented evidence of an association-in-fact enterprise between defendant and the businesses which he used to establish the bank accounts wherein he deposited the proceeds of his securities scam. The magistrate's dismissal of this enterprise theory similarly constitutes an error of law. Pledger, 896 P.2d at 1230.

An association-in-fact enterprise "is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit." Turkette, 452 U.S. at 583. As noted previously, a UPUA enterprise includes any union or group of individuals associated in fact although not a legal entity, and includes illicit as well as licit entities. Section 76-10-1602 (1). Here, the magistrate found that defendant used various registered and unregistered businesses to establish the disguised checking accounts wherein he deposited his ill-gotten proceeds (R. 460, see addendum A). However, the magistrate erroneously failed to conclude that defendant's relationship with these businesses constituted an association-in-fact enterprise (see R. 464, see addendum A). Instead, the magistrate concluded that defendant's use of the businesses merely constituted more pattern evidence (Id.). In so

concluding, the magistrate overlooked critical evidence concerning the nature of the businesses associated with defendant.

Specifically, at least three of the business were connected to individuals other than defendant. As noted previously, Tempus Utile was a limited corporation involving three other individuals (R. 1165, Supp. R. 1332-1334, Exh. #7). Further, the FSB account corresponding to the Sourceline business was co-owned by defendant and Jerry Sheets (R. 1124-25), and the Bank One account corresponding to the Cross Country Management business was co-owned by Ed Parker and Myron Abbott (R. 1157).

The magistrate's failure to give these facts proper consideration is significant because none of the above individuals are alleged to have participated in the fraudulent securities activity for which defendant was previously bound over. Therefore, this evidence is not properly viewed as buttressing the pattern element; rather, it goes to the establishment of the separate enterprise element. Indeed, this evidence establishes that the magistrate erred in concluding that the defendant-controlled bank accounts were mere extensions of defendant and/or his investment advisor business. While defendant primarily controlled the bank accounts, his connections to individuals associated with the accounts establishes that he was not operating as a strictly "one man show." Compare Guidry

v. Bank of La Place, 740 F.Supp. 1208, 1212 (E.D. La. 1990) (holding that bank account in and of itself was an inanimate object which could not constitute RICO enterprise), aff'd as modified, 954 F.2d 278 (5th Cir. 1992) with United States v. Feldman, 853 F.2d 648, 656 (9th Cir. 1988) (rejecting RICO defendant's claim that he was not sufficiently separable from businesses he incorporated for purposes of forming an association-in-fact enterprise therewith, on the ground that the associated corporations were far from "one-man shows," and were themselves legal entities), cert. denied, 489 U.S. 1030 (1989).

These overlooked facts are also significant because an association-in-fact enterprise can consist of both individuals and corporations. Accordingly, defendant's relationship with his Tempus Utile partners alone constitutes an association-in-fact enterprise. See Feldman, 853 F.2d at 655-56 (holding that an association-in-fact enterprise can consist of individuals and corporations). The corporate nature of Tempus Utile alone is also sufficient to establish that enterprise here was separate from defendant's the pattern of unlawful conduct. See River City Markets v. Fleming Foods West, 960 F.2d 1458, 1461 (9th Cir. 1992) (noting that "one can associate with a group of which he is a member, with the member and the group remaining distinct entities"). Indeed, other than their connection to the bank accounts wherein defendant deposited his ill-gotten proceeds,

defendant's Tempus Utile partners, as well as Sheets, Abbott and Parker, have no alleged involvement in defendant's pattern of securities act violations. See Chang v. Cheng, 80 F.3d 1293, 1300 (9th Cir. 1996) ("the involvement of a corporation, which has an existence separate from its participation in the racketeering activity, can satisfy the enterprise element's requirement of a separate structure"); United States v. Kirk, 844 F.2d 660, 664 (9th Cir.) (holding that where government presented evidence of several lawful entities existing separately from the racketeering activities, "the existence of a corporation fulfills the requirements of an ascertainable structure apart from the predicate racketeering activity"), cert. denied, 488 U.S. 890 (1988).

As for the ongoing organization of the association, that is adequately established by defendant's common control of the accounts--he was the sole signatory on all but the Cross Country Management accounts. Turkette, 452 U.S. at 579 (noting that "common thread" to association in fact enterprise was Turkette's "leadership"). Significantly, although defendant did not own the Cross Country Management account, he made deposits thereto and corresponding amounts were subsequently transferred to a defendant-controlled account (R. 1157; Supp. R. 1533-1540, Exh. ##63-63A). Thus, the evidence suggests a decision making mechanism controlled by defendant. Sanders, 928 F.2d 940, 943

(finding indicia of an ongoing organization was established with evidence of a "decision-making framework or mechanism for controlling the group"); Chang, 80 F.3d at 1299 (holding that organizational structure of an enterprise "should provide 'some mechanism for controlling and directing the affairs of the group on an ongoing, rather than an ad hoc, basis'").

Finally, defendant's deposits and transfers between the accounts also serve to establish the continuity of the association-in-fact enterprise. Indeed, the commingling of the accounts created a shared financial connection between them. See Feldman, 853 F.2d at 647 (deeming shared financial connections significant to establishment of a continuing enterprise). These transactions were multitudinous, not isolated, and are detailed in the charts and spreadsheets prepared by the State's investigator (R. 463, see addendum A and Supp. R. 1433-1523, 1525-1540, Exh. ## 53-59A, 61-63A). See McGrath, 749 P.2d at 637 (deeming it significant that drug trafficking enterprise conducted more than one "isolated transaction").

When viewed in the light most favorable to the UPUA charge as Pledger requires, he above facts establish an association-in-fact enterprise for the purpose of hiding defendant's securities fraud proceeds. Defendant's participation in the enterprise, combined with his acts constituting a pattern of securities act violations, establish the necessary elements of

the UPUA charge under all three UPUA subsections. The magistrate's failure to so recognize constitutes error as a matter of law. Lewis, 791 P.2d at 1154.

POINT II

THE MAGISTRATE ERRED IN FAILING TO RECOGNIZE THAT DEFENDANT'S CONDUCT IN DEPOSITING THE PROCEEDS OF HIS SECURITIES FRAUD SCAM INTO DISGUISED ACCOUNTS, AND/OR HIS COMMINGLING OF FUNDS IN THESE ACCOUNTS INDICATED AN INTENT TO CONCEAL THE PROCEEDS UNDER THE MONEY LAUNDERING STATUTE

A. Defendant's Concealed Bank Deposits Constitute Sufficient Evidence of Money Laundering for Bind Over Purposes

The State charged defendant with ten violations of Utah Code Ann. § 76-10-1903 (1995), which provides in pertinent part as follows:

> (1) A person commits the offense of money laundering by financial transaction if, knowing that the property involved in a financial transaction represents proceeds of some form of unlawful activity, he conducts or attempts to conduct a financial transaction which in fact involves the proceeds of specified unlawful activity: . . . (b) knowing that the transaction is designed in whole or in part to: (i) conceal or disguise the nature, the location, the source, the ownership or the control of the proceeds of specified unlawful activity[.][12]

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[12] The State also charged defendant under subsection (1)(a)("to promote the unlawful activity"); however, because the prosecution's argument in the preliminary hearing court was premised primarily on its theory that defendant intentionally concealed or disguised the nature, location, source, ownership, or control of the property, the State makes no argument under subsection (1)(a) for purposes of this appeal.

The "specified unlawful activity" pertinent to the instant case is the 24 securities act violations for which defendant was bound over for trial (R. 465-65, see addendum A). Additionally, one "conducts" a "transaction" for purposes of the money laundering statute by making a bank deposit, withdrawal and/or transfer between bank accounts. Utah Code Ann. § 76-10-1902(2), (11) (1995) (see addendum B). Accord United States v. Garcia-Emanuel, 14 F.3d 1469, 1475-76 (10th Cir. 1994) ("A variety of types of evidence" have been found "supportive . . . of an intent to disguise or conceal" for purposes of the federal money laundering statute, including "depositing illegal profits in the bank account of a legitimate business[.]"); United States v. Reynolds, 64 F.3d 292, 297 (7th Cir. 1995) ("A financial transaction includes making a deposit into an account[.]"), cert. denied, 116 S.Ct. 969 (1996).[13]

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[13] Utah's money laundering statute has yet to be interpreted by its appellate courts. Because the statute essentially tracks the pertinent language of the federal money laundering statute, see 18 U.S.C.A. § 1956 (a)(1)(B)(i) (1996) (prohibiting knowingly conducting a financial transaction involving the proceeds of specified unlawful activity with the intent to "conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity"), interpretative federal case law is persuasive. See, e.g., State v. Hunt, 781 P.2d 473 (Utah App. 1989) (applying federal law to the Utah Interception of Communication Act, Utah Code Ann. §§ 77-23a-1 to 77-23a-16 (Supp. 1989), noting that the Utah act was based on Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510 to 2520), cert. denied, 789 P.2d 33 (Utah 1990).

Defendant's conduct in this case plainly fits within the parameters of the money laundering statute. The magistrate expressly found that defendant, upon receiving the victims' checks, *deposited* them into different checking accounts which "bore the name of the security offered the victim," but which defendant in fact owned or controlled (R. 461, see addendum A). The magistrate also found that defendant deposited a $25,000 check from Dr. Nelson into the Cross County Management (CCM) account over which he (defendant) had no signatory authority; however, one of the CCM account signatories subsequently issued a check for $25,000 to F.C. Finance, an account over which defendant maintained sole control (R. 1157). Thus, within a week of depositing the $25,000 into the CCM account defendant regained sole control of Dr. Nelson's money (R. 463, see addendum A).

Having made these deposits, defendant told each victim that his money had been invested in a particular company and that the money was *not* in his (defendant's) control (R. 463, see addendum A). The magistrate found that when asked, defendant evaded and otherwise refused to answer the victims questions regarding the location, nature and control of their money (Id.). Although some victims' actually received alleged interest payments on their investments, these payments were received in the form of cashiers' checks drawn on a bank and were not from the company with which the victim had purportedly invested (Id.).

Finally, the magistrate found that defendant personally withdrew the proceeds and/or made multiple transfers of the proceeds between his other controlled accounts and other entities (Id.).

The magistrate's findings provide "sufficient" support for the money laundering charges in this case. Pledger, 896 P.2d at 1229-30. The reasonable inferences from the magistrate's findings and bind over order on the securities act violations are 1) that defendant knew the monies he deposited were proceeds of his fraudulent investment scam, and 2) that these deposits were designed in whole or in part to conceal the ill-gotten proceeds from the victims. See Section 76-10-1903.

Ironically, the magistrate determined the opposite, concluding that there was "no probable cause to establish that defendant *intentionally concealed* the proceeds," based on a perceived lack of evidence concerning "various transactions between the defendant controlled accounts and other entities *after* the deposits of the physicians' proceeds into the defendant-controlled accounts" (R. 465, see addendum A) (emphasis added). In so ruling, the magistrate effectively required proof concerning the ultimate use of the proceeds which proof is simply not an element of money laundering. See Section 76-10-1903.

Contrary to the magistrate's reasoning, disguised and/or concealed bank deposits constitute proof of concealment for money laundering purposes--beyond even a reasonable doubt.

See Reynolds, 64 F.3d at 297 (upholding Reynolds' conviction for money laundering upon proof that he instructed his secretary/codefendant to misdirect local UMWA dues to her personal bank account and to alter financial records so that the International UMWA would believe the local district's income from dues was less that what it actually received); United States v. Jackson, 935 F.2d 832, 842 (7th Cir. 1991) (upholding money laundering conviction where defendant, a minister/drug dealer, deposited his drug sale proceeds into church account, but treated the funds as his own); United States v. Holmes, 44 F.3d 1150, 1155-56 (2nd Cir. 1995) (affirming money laundering conviction based on evidence that Holmes deposited embezzled Union funds into his personal bank account and later withdrew some of it); U.S. v. Posters N Things LTD, 969 F.2d 652, 661 (8th Cir. 1992) (upholding money laundering conviction where defendant deposited both legal and illegal proceeds into one bank account from which she then made personal withdrawals), aff'd, 511 U.S. 513 (1994); United States v. Sutera, 933 F.2d 641, 648 (8th Cir. 1991) (upholding money laundering conviction where defendant deposited illegal gambling proceeds into account named for his legitimate restaurant business and caused checks to be drawn on the account in the restaurant's name which he used to pay his personal bills and gambling-related expenses).

While the evidence in Jackson, Holmes, Posters N Things, and Sutera established that those defendants also made subsequent particular personal uses of the deposited illegal proceeds, such evidence is not necessarily critical to the establishment of an intent to conceal proceeds for purposes of a money laundering conviction. See, e.g., Reynolds, 64 F.3d at 297 (upholding money laundering conviction based solely on evidence that Union dues were criminally misdirected and deposited into codefendants' personal bank account). See also Section 76-10-1903. Rather, the emphasis in money laundering cases is on the intent to conceal illegal proceeds. Garcia-Emanual, 14 F.3d at 1476 (noting that federal money laundering statute is a "concealment statute--not a spending statute"). Indeed, the Sutera court emphasized that to successfully prosecute a money laundering *conviction*, necessitating proof beyond a reasonable doubt, "[t]he jury simply ha[d] to find that Sutera *intended to hide* the gambling proceeds." Sutera, 933 F.2d at 648 (emphasis added). See also Posters N Things, 969 F.2d at 661 (emphasizing that a reasonable juror could infer an intent to disguise the nature or source of unlawful proceeds where defendant indistinguishably commingled in one account both legal and illegal receipts).

Further, there is no requirement that a money laundering defendant be particularly adroit in concealing illegal

proceeds. Sutera, 933 F.2d at 648 (noting that while Sutera could have "better hidden" illegal gambling proceeds by commingling the funds with legitimate restaurant receipts, "the money laundering statute [did] not require the jury to find that Sutera [had done] a good job of laundering proceeds."); Jackson, 935 F.2d at 842 (fact that Jackson's "deception was ultimately unsuccessful, and even that it was relatively easy for investigators to pierce, does not mean that it falls beyond the statute's reach").

Thus, an intent to conceal proceeds for purposes of the money laundering statute is established when, as here, the nature, location, ownership and or control of those proceeds is concealed and/or disguised by depositing them into shell accounts. It necessarily follows that such evidence will suffice as probable cause for bind over purposes. Pledger, 896 P.2d at 1230.

B. Defendant's Transfers of Proceeds Between His Various Controlled and Uncontrolled Accounts Supports Money Laundering Charges

Even if evidence concerning defendant's ultimate use of the proceeds is deemed critical evidence for bind over purposes, sufficient indication of such was introduced below.

For example, the evidence established and the magistrate found that the spreadsheets prepared by the State's investigator reflected that defendant personally withdrew

proceeds and also transferred proceeds between his controlled accounts and other entities which he did not control (R. 461-64, see addendum A) (see Supp. R. 1432-1540, Exh. ## 53-59A, 60-63A). While the investigator's oral testimony could possibly have been more detailed as to some of these transactions, the spreadsheets provide abundant indication that such withdrawals and transfers in fact occurred (Id.). See United States v. Willey, 57 F.3d 1374, 1386 (5th Cir. 1995) ("[m]oving money through a large number of accounts has, in the light of other evidence, also been found to support the design element of [money laundering], even when all the accounts to which the defendant transferred the money and from which he withdrew it were in his own name."), cert. denied, 116 S.Ct. 675 (1995). To the extent the magistrate's dismissal suggests that the State was required to segregate transactions involving illegal proceeds from any possibly legitimate transactions, such is not required by the majority of federal courts considering the question. See, e.g., United States v. Johnson, 971 F.2d 563, 570 (10th Cir. 1992)(holding government not required to show that no legitimate funds were deposited along with unlawful proceeds on the ground that "[s]uch an interpretation would allow individuals to avoid prosecution simply by commingling legitimate funds with procceds of crime," and thereby "defeat the very purpose of the money-laundering statutes"); Garcia, 37 F.3d 1359, 1365 (9th Cir. 1994)

(holding that "[i]t is unnecessary to attempt to segregate in some manner the tainted funds from the commingled account."); Jackson, 935 F.2d at 840 (holding that government is not required to trace origin of all deposited sums in order to determine exactly which funds were used for what transaction); United States v. Bencs, 28 F.3d 555, 562 (6th Cir. 1994) (refusing to read money laundering statute "in a manner that would reward the more creative money-launderer by allowing him to escape liability altogether by commingling assets or otherwise disguising the source of his funds"), cert. denied, ___ U.S. ___, 115 S.Ct. 915 (1995); United States v. Moore, 27 F.3d 969, 977 (4th Cir.) ("govenrment is not reqiured to prove that no 'untainted' funds were involved, or that funds used in the transaction were exclusively derived from the specified unlawful activity"), cert. denied, 115 S.Ct. 459 (1994). Cf. United States v. Heath, 970 F.2d 1397, 1404 (5th Cir. 1992) (holding that government need not trace source of funds used in each individual transaction where aggregate of funds transferred exceeded "untainted" money in account), cert. denied sub nom, Cheng v. United States, 509 U.S. 1004 (1993); Willey, 57 F.3d at 1386 (holding that evidence that defendant commingled proceeds with legitimate business was sufficient to support money laundering charge).

Thus, remembering that the State's evidence is presumed to strengthen by time of trial, the above evidence supports

defendant's intent to conceal the proceeds for bind over purposes. Pledger, 896 P.2d at 1229-30. It may be that evidence regarding defendant's ultimate and precise use of the proceeds will assist a jury to reach a guilty verdict in this case, but such is not a required element of the money laundering statute. See Section 76-10-1903. Rather, all that is required is proof that defendant intended to conceal his ill-gotten proceeds by means of a financial transcation, in this case, by depositing the proceeds into concealed bank accounts. Id.; Section 76-10-1902(2)(11). Accordingly, the magistrate erred as a matter of law when it dismissed these charges based on its concerns about the ultimate use of the proceeds. Pledger, 896 P.2d at 1230. The dismissal order should be overruled.

CONCLUSION

The order dismissing the pattern of unlawful activity and money laundering charges should be reversed and the case remanded for entry of an order binding defendant over for trial on these charges, together with the 24 securities act violations previously bound over.

RESPECTFULLY submitted this 25th day of November, 1996.

JAN GRAHAM
Utah Attorney General

MARIAN DECKER
Assistant Attorney General

CERTIFICATE OF MAILING

I certify that on the 25th day of November 1996, I caused to be mailed, by U.S. Mail, postage prepaid, two (2) true and correct copies of this **BRIEF OF APPELLANT** to:

D. GILBERT ATHAY
LONI F. DELAND
43 East 400 South
Salt Lake City, Utah 84111
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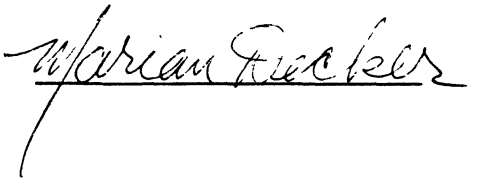

ADDENDA

ADDENDUM A

1-30-96

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IN THE THIRD CIRCUIT COURT STATE OF UTAH

SALT LAKE COUNTY, SALT LAKE DEPARTMENT

THE STATE OF UTAH,	:	
Plaintiff,	:	**FINDINGS OF FACT AND CONCLUSIONS OF LAW**
vs.	:	**AND ORDER**
GLENN EARL LLOYD, II,	:	Case No. 941020860
Defendant.	:	Judge Michael Hutchings

The above-entitled matter came on regularly for hearing on November 13 - 16, 1995 and January 3, 1996 before the Honorable Michael Hutchings. The Defendant, Glenn Earl Lloyd II, was present and represented by Gilbert Athay and Lonnie DeLand. The State of Utah was represented by Robert K. Hunt. The Court, being fully advised in the premises, hereby enters its findings of fact and conclusions of law as they pertain to counts 25 through 35 of the information

as follows[1]:

FINDINGS OF FACT

1. The Court finds that, in order to bind over a charge under the Utah Pattern of Unlawful Activity Act (Utah Code Ann. § 76-10-1601, et. seq.), the State must demonstrate probable cause that defendant engaged in at least three episodes of unlawful activity. The Act specifically includes securities fraud as well as the sale of unregistered securities as unlawful acts. (Utah Code Ann. § 76-10-1602(1) and Utah Code Ann. § 76-10-1602 (4) (iii)).

2. In order to bind over a charge, the Court finds that the State must demonstrate probable cause that defendant maintained, established, operated, conducted or participated in an enterprise, which is defined as "a continuing unit for a common purpose of engaging in a course of conduct." State v. McGrath 749 P.2d 631, 637 (Utah 1988) *quoting from* United States v. Dickens 695 F.2d 765, 773 (3d Cir. 1982), *cert. Denied*, 460 U.S. 1092 (1983). An enterprise is "any individual, sole proprietorship, partnership, corporation, business trust, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity, and includes illicit as well as licit entities."

---

[1] By agreement between the parties and the court, these findings of facts and conclusions of law address only the ten counts which were not bound over to District Court.

Utah Code Ann. § 76-10-1602(1). Because "the 'enterprise' is not the 'pattern of racketeering activity'" the evidence must demonstrate probable cause that the enterprise is "an entity separate and apart from the pattern of activity in which it engages." Id. at 637.

3. The Court finds that, in order to bind over the defendant based on allegations of money laundering, the State must present evidence that the defendant conducted a financial transaction,

> if, knowing that the property involved in a financial transaction represents proceeds of some form of unlawful activity, he conducts or attempts to conduct a financial transaction which in fact involves the proceeds of specified unlawful activity:
>
> ...
>
> (b) knowing that the transaction is designed in whole or in part to:
>
> (i) conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity.

Utah Code Ann. § 76-10-1903 (1990). Securities fraud and the sale of unregistered securities are "specified unlawful activities." (Utah Code Ann. § 76-10-1902(9))

4. The uncontroverted facts presented at the preliminary hearing were as follows:

a. During all times relevant to the charges presented (1991 through 1994), defendant maintained an investment advisor business entitled Applied Financial Concepts through which he gave investment advice, assisted individuals in investing their money and transferred individuals' money to various investments.

b. The defendant represented himself as an investment advisor to the following

individuals: Dr. Stephen Bennett, Dr. Roger Sheffield, Dr. William Ellingson, Dr. Elmo Gruwell, Dr. Ronald Saunders, Dr. Joseph Nelson, Dr. Paul Robinson, Dr. Wendell Gadd and Dr. Alan Rappleye.

c. In his capacity as an investment advisor, defendant personally met with each of the above-referenced individuals to discuss investing in one or more of the following companies: F.C. Leasing, CC Management, Cross Country Management, Peak Strategy Management, Sourceline Capital, AFC Inter-Cap, Internal Capitalization Partnership, Tempus Utile, FC Finance, and AFC.

d. In each meeting, defendant described the above-referenced companies as existing, viable companies doing business in the State of Utah.

e. The defendant told each physician that his investments were low risk and that his principal would be returned in a period of one to three years and during that time period, the physicians would receive monthly or quarterly interest payments, ranging from eight to fourteen percent.

f. After the physicians were offered the securities, the physicians agreed to invest in the described business and, in each instance, physically handed the defendant a check issued to the specific business in which they had decided to invest.

g. The defendant opened the following checking accounts through the use of registered and unregistered dbas: Sourceline Capital (Draper Bank ("Draper") #

91-02679-9), FC Finance (First Security Bank ("FSB") # 216-26776-10), FC Leasing (FSB # 216-25076-16), AFC (FSB # 216-26091-15), Peak Strategy Management (FSB #216-1019290), Cross Country Management. (Bank One # 1162-8004), AFC Inter-Cap (Zions Bank # 015-352206), Tempus Utile (First Interstate Bank # 26-03050-2), CC Management (FSB # 216-10192-82), and Internal Capitalization Management (FSB # 216-00229-15). The defendant was the sole signatory on these accounts and defendant was the only person who deposited or withdrew money out of these accounts.

h. There were two Sourceline Capital accounts, one at Draper Bank and one at First Security Bank. The Sourceline Capital account at Draper Bank listed Jerry Sheets as a signatory and is not relevant to the State's money laundering charge. However, the First Security Bank Sourceline Capital account (FSB #216-00015-88) was established by the defendant and he was the sole signatory.

i. After the defendant personally received the victims' checks, he deposited the checks into the above-referenced accounts which he owned and controlled. These accounts bore the name of the security offered the victim so the money could be deposited into that account. The deposits occurred as follows:

* Dr. Sheffield's $10,000.00 to "Sourceline Capital" (FSB #216-00015-88)

* Dr. Nelson's $40,394.00 to FC Finance (FSB # 216-26776-10)

* Dr, Rappleye"s $29,250, Dr. Saunders' $ $25,000.00, Dr. Ellingson's $20,000.00, Dr. Bennett's $20,000.00, and Dr. Gadd's $15,000.00 to FC Leasing (FSB # 216-25076-16)

* Dr. Rappleye's $10,000.00, Dr. Gruwell's $10,000.00, and Dr. Nelson's $10,000.00 to AFC (FSB # 216-26091-15)

* Dr. Nelson's $70,000.00 and Dr. Bennett's $20,625 to Peak Strategy Management (FSB #216-1019290)

* Dr. Nelson's $25,000.00 and Dr. Bennett's $10,000.00 to Cross Country Management. (Bank One # 1162-8004)

* Dr. Bennett's $20,000.00 and Dr. Saunders, $15,000.00 to AFC Inter-Cap (Zions Bank # 015-352206)

* Dr Saunders' $25,000.00 to Tempus Utile (First Interstate Bank # 26-03050-2)

* Dr. Nelson's $90,000.00 to CC Management (FSB # 216-10192-82)

* Dr. Bennett's $15,000.00 and Dr. Gadd's $15,000.00 to Internal Capitalization Management (FSB # 216-10192-82).

j. Cross Country Management at Bank One listed Myron Lee Abbott and Edward C. Parker as signatories. However, Dr. Nelson's $25,000.00 was the opening deposit in that account on July 20, 1993. On that same day, $10.00 cash was also placed in the account. On July 27, 1993, Myron Abbott issued a check for $25,000.00 from the Cross Country Account to FC Finance, an account over which the defendant had sole control. Other than these three transactions, no other money went in or out of the Cross Country Management account during the week of July 20 - 27, 1993. Within one week, the defendant gained control over Dr. Nelson's

$25,000.00, which Dr. Nelson was told would be invested in a business entitled Cross Country Management.

k. At all times relevant hereto, the defendant told the victims that their proceeds were invested in the existing, viable, Utah companies which he initially offered them and that the proceeds were not in his control. Defendant refused to answer the physicians' questions regarding the proceeds' location, nature and control.

l. Each time a victim actually received an alleged interest payment on his investment, he would receive it in the form of a cashier's check drawn on a bank and not from the alleged investment entity or even the defendant-controlled account by the same name.

m. After the physicians' funds were deposited into one or more of the defendant-controlled accounts, the spreadsheets (Exhibits # 53A - 63A) established that the following relevant activity occurred: 1) Funds would be withdrawn and deposited in the various defendant-controlled accounts; 2) Funds would be withdrawn from the defendant-controlled accounts and deposited into one or more of the defendant's personal accounts; 3) Funds would be withdrawn from the defendant-controlled accounts and transferred to other entities not controlled by the defendant; or, 4) Funds would be deposited into the defendant-controlled accounts from other entities not controlled by the defendant.

n. The spreadsheets from each defendant-controlled account (Exhibits 53A through 63A) established and explained the deposit and withdrawal activity which occurred specifically between the ten defendant-controlled accounts as well as the defendant's personal checking accounts.

o. However, the State presented no testimony explaining the withdrawal and deposit activity in the defendant-controlled accounts relating to entities not controlled or established by the defendant such as Star King, Adalyn Financial, Capstone and Towers, among others.

p. Furthermore, the State's witness which testified as to the above-described accounts could not tell the Court whether these defendant-controlled accounts were interest bearing.

q. During the time defendant was transferring these funds between his accounts and to himself, he continued to maintain his investment advisor company, Applied Financial Concepts, and continued to represent himself as an investment advisor.

CONCLUSIONS OF LAW

1. The Court concludes that since counts one through twenty four have been bound over to District Court, probable cause exists to establish evidence of the pattern element required under the Utah Pattern of Unlawful Activity Act.

2. The Court concludes that, as a matter of law, there was no probable cause to suggest that

defendant's use of his investment advisor business, Applied Financial Concepts, and his use of various licit and illicit dbas in establishing the checking accounts wherein he deposited the physicians' checks demonstrated the existence of an enterprise.

3. The Court concludes that the evidence used to establish the existence of the investment advisor company as well as the various dbas is evidence which only further establishes and proves the elements of the pattern (the securities fraud and the sale of unregistered securities), and not the existence of an enterprise.

4. In reference to the ten money laundering counts, the Court concludes that there is no probable cause to establish that the defendant intentionally concealed the proceeds since no evidence was presented to answer the Court's questions as to the various transactions which transpired between the defendant-controlled accounts and other entities after the deposits of the physicians' proceeds into the defendant-controlled accounts.

DATED this 21 day of February 1996.

Michael Hutchings
Circuit Court Judge

Order

THE COURT, having been fully advised in the premises,

IT IS HEREBY ORDERED:

1. That counts one through twenty four of the criminal information be bound over to District court.

2. That counts twenty five through thirty five be dismissed.

DATED this 26 day of February, 1996.

Michael Hutchings
Circuit Court Judge

Approved as to form:

Gilbert Athay
Attorney for the Defendant

CERTIFICATE OF SERVICE

I hereby certify that on this 30 day of January, 1996, I caused a true and correct copy of the foregoing "FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER" to be hand-delivered to the following:

Gilbert Athay, Esq.
Loni DeLand, Esq.
Attorneys for Defendant
43 East 400 South
Salt Lake City, Utah 84111

ADDENDUM B

670 F. Supp. 920 (D. Utah 1987); State v. McGrath, 749 P.2d 631 (Utah 1988).

COLLATERAL REFERENCES

Utah Law Review. — Child Sexual Abuse Cases, 1986 Utah L. Rev. 443.

76-10-1603. Unlawful acts.

(1) It is unlawful for any person who has received any proceeds derived, whether directly or indirectly, from a pattern of unlawful activity in which the person has participated as a principal, to use or invest, directly or indirectly, any part of that income, or the proceeds of the income, or the proceeds derived from the investment or use of those proceeds, in the acquisition of any interest in, or the establishment or operation of, any enterprise.

(2) It is unlawful for any person through a pattern of unlawful activity to acquire or maintain, directly or indirectly, any interest in or control of any enterprise.

(3) It is unlawful for any person employed by or associated with any enterprise to conduct or participate, whether directly or indirectly, in the conduct of that enterprise's affairs through a pattern of unlawful activity.

(4) It is unlawful for any person to conspire to violate any provision of Subsection (1), (2), or (3).

History: C. 1953, § 76-10-1603, enacted by L. 1987, ch. 238, § 3.

Repeals and Reenactments. — Laws 1987, ch. 238, § 3 repeals former § 76-10-1603, as last amended by Laws 1985, ch. 234, § 3, relating to unlawful acts and forfeitures, and enacts the present section.

NOTES TO DECISIONS

ANALYSIS

Conspiracy.
Elements.
Enterprise.
Pattern of unlawful activity.

Conspiracy.

Although conspiracy is one of the enumerated acts of racketeering under § 76-10-1602, it is not a separate basis for recovery under this section but is merely a crime that may qualify as one of the predicate acts needed to show a pattern of racketeering activity; standing alone, a charge of conspiracy does not state a cause of action under this section. Bache Halsey Stuart Shields, Inc. v. Tracy Collins Bank & Trust Co., 558 F. Supp. 1042 (D. Utah 1983).

Elements.

Both the "pattern of racketeering [unlawful] activity" and "enterprise" elements must be established to convict under this section. State v. McGrath, 749 P.2d 631 (Utah 1988).

In dismissing plaintiffs' pattern of unlawful activity claim, it was error for the trial court to rule that "plaintiffs did not prove the existence of three similar instances of unlawful activity that involve separate and different entities" because the act does not require three separate entities and, furthermore, the existence of one enterprise is sufficient to invoke liability under the act. Alta Indus. Ltd. v. Hurst, 846 P.2d 1282 (Utah 1993).

Enterprise.

Evidence established the existence of an "enterprise," where defendant and another had an ongoing association for the purpose of making money from the sale of controlled substances, and the two men functioned as a continuing unit for a common purpose of engaging in a course of conduct. State v. McGrath, 749 P.2d 631 (Utah 1988).

Indictment and bill of particulars did not sufficiently describe factual basis for element of enterprise to enable defendant to prepare adequate defense. State v. Bell, 770 P.2d 100 (Utah 1988).

Pattern of unlawful activity.

A pattern of racketeering activity requires

NOTES TO DECISIONS

ANALYSIS

Culpability.
Elements.
Cited.

Culpability.

This section requires the state to prove beyond a reasonable doubt that defendant either knew of the falsity, or had a reckless disregard for the truth, of any "pretenses, representations, promises, or material omissions" made by the defendant. Former Subsection (7), making absence of knowledge or recklessness an affirmative defense, merely emphasized that absent either of these mental states, a conviction for communications fraud is improper. State v. Tebbs, 786 P.2d 775 (Utah Ct. App. 1990).

This section has never placed upon defendant the burden to prove the absence of criminal intent on his part. See State v. Tebbs, 786 P.2d 775 (Utah Ct. App. 1990).

Elements.

A required element of the crime of communications fraud is that the object of the fraud be proven. State v. Becker, 803 P.2d 1290 (Utah Ct. App. 1990).

Cited in State v. LeFevre, 825 P.2d 681 (Utah Ct. App. 1992).

PART 19

MONEY LAUNDERING AND CURRENCY TRANSACTION REPORTING

76-10-1901. Short title.

This part is known as the Money Laundering and Currency Transaction Reporting Act.

History: C. 1953, 76-10-1901, enacted by L. 1989, ch. 241, § 1.

76-10-1902. Definitions.

As used in this part:

(1) "Bank" means each agent, agency, or office in this state of any person doing business in any one of the following capacities:

(a) a commercial bank or trust company organized under the laws of this state or of the United States;

(b) a private bank;

(c) a savings and loan association or a building and loan association organized under the laws of this state or of the United States;

(d) an insured institution as defined in Section 401 of the National Housing Act;

(e) a savings bank, industrial bank, or other thrift institution;

(f) a credit union organized under the laws of this state or of the United States; or

(g) any other organization chartered under Title 7 and subject to the supervisory authority set forth in that title.

(2) "Conducts" includes initiating, concluding, or participating in initiating or concluding a transaction.

(3) (a) "Currency" means the coin and paper money of the United States or of any other country that is designated as legal tender, that circulates, and is customarily used and accepted as a medium of exchange in the country of issuance.

(b) "Currency" includes United States silver certificates, United States notes, Federal Reserve notes, and foreign bank notes customarily used and accepted as a medium of exchange in a foreign country.

(4) "Financial institution" means any agent, agency, branch, or office within this state of any person doing business, whether or not on a regular basis or as an organized business concern, in one or more of the following capacities:

(a) a bank, except bank credit card systems;

(b) a broker or dealer in securities;

(c) a currency dealer or exchanger, including a person engaged in the business of check cashing;

(d) an issuer, seller, or redeemer of travelers checks or money orders, except as a selling agent exclusively who does not sell more than $150,000 of the instruments within any 30-day period;

(e) a licensed transmitter of funds or other person engaged in the business of transmitting funds;

(f) a telegraph company;

(g) a person subject to supervision by any state or federal supervisory authority; or

(h) the United States Postal Service regarding the sale of money orders.

(5) "Financial transaction" means a transaction:

(a) involving the movement of funds by wire or other means or involving one or more monetary instruments, which in any way or degree affects commerce; or

(b) involving the use of a financial institution that is engaged in, or its activities affect commerce in any way or degree.

(6) The phrase "knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity" means that the person knows the property involved in the transaction represents proceeds from a form, though he does not necessarily know which form, of activity that constitutes a felony under state or federal law, regardless of whether or not the activity is specified in Subsection (9).

(7) "Monetary instruments" means coins or currency of the United States or of any other country, travelers checks, personal checks, bank checks, money orders, and investment securities or negotiable instruments in bearer form or in other form so that title passes upon delivery.

(8) "Person" means an individual, corporation, partnership, trust or estate, joint stock company, association, syndicate, joint venture, or other unincorporated organization or group, and all other entities cognizable as legal personalities.

(9) "Prosecuting agency" means the office of the attorney general or the office of the county attorney, including any attorney on the staff whether acting in a civil or criminal capacity.

(10) "Specified unlawful activity" means any unlawful activity defined as an unlawful activity in Section 76-10-1602, except Subsection (4)(aaaa), and includes activity committed outside this state which, if committed within this state, would be unlawful activity.

(11) "Transaction" means a purchase, sale, loan, pledge, gift, transfer, delivery, or other disposition. With respect to a financial institution, "transaction" includes a deposit, withdrawal, transfer between accounts,

exchange of currency, loan, extension of credit, purchase or sale of any stock, bond, certificate of deposit, or other monetary instrument, or any other payment, transfer, or delivery by, through, or to a financial institution, by whatever means effected.

(12) "Transaction in currency" means a transaction involving the physical transfer of currency from one person to another. A transaction that is a transfer of funds by means of bank check, bank draft, wire transfer, or other written order that does not include the physical transfer of currency is not a transaction in currency under this chapter.

History: C. 1953, 76-10-1902, enacted by L. 1989, ch. 241, § 2; 1993, ch. 80, § 1.

Amendment Notes. — The 1993 amendment, effective May 3, 1993, added Subsections (1), (4), and (9), deleted former Subsections (7) and (8), which defined "reporting institution" and "reporting person," and redesignated the remaining subsections accordingly and, in Subsection (10), substituted "defined as an unlawful activity" for "as defined" near the beginning and added all of the language beginning with "except" at the end.

Federal Law. — Section 401 of the National Housing Act, cited in Subsection (1)(d), was 12 U.S.C. § 1724. It was repealed in 1989, along with the rest of Subchapter IV of the Act, Insurance of Savings and Loan Accounts.

Compiler's Notes. — The reference in Subsection (6) to Subsection (9) should now cite Subsection (10), which specifies unlawful activity and which was redesignated from (9) to (10) by the 1993 amendment.

76-10-1903. Money laundering by financial transaction — Elements — Penalty.

(1) A person commits the offense of money laundering by financial transaction if, knowing that the property involved in a financial transaction represents proceeds of some form of unlawful activity, he conducts or attempts to conduct a financial transaction which in fact involves the proceeds of specified unlawful activity:

(a) with intent to promote the carrying on of specified unlawful activity; or

(b) knowing that the transaction is designed in whole or in part to:

(i) conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or

(ii) avoid a transaction reporting requirement under this chapter.

(2) Money laundering by financial transaction is a second degree felony.

History: C. 1953, 76-10-1903, enacted by L. 1989, ch. 241, § 3.

76-10-1904. Money laundering by transportation — Elements — Penalty.

(1) A person commits the offense of money laundering by transportation if he transports or attempts to transport a monetary instrument or funds:

(a) with the intent to promote the carrying on of specified unlawful activity; or

(b) knowing that the monetary instrument or funds involved in the transportation represent the proceeds of some form of unlawful activity and knowing that the transportation is designed in whole or in part to: